

SIM KEE GUAN v. PUBLIC PROSECUTOR

[O.Cr.J. (Edgar Joseph Jr. J.) 5 May 1988]

[Penang – Criminal Application No. 54-4-88]

Constitutional Law – Right to counsel – Counsel of choice being detained under preventive detention order – Whether accused can still exercise his constitutional right in such circumstances – Federal Constitution, Article 5(3) – Criminal Procedure Code (F.M.S. Cap. 6), s. 255.

Criminal Procedure – Counsel of choice detained – Court's power to order production of detained counsel so as to enable him to represent accused – Internal Security Act (Detained Persons) Rules 1960, r. 93(1).

Legal Profession – Counsel of choice being detained – Whether accused can still exercise his right to counsel – Internal Security (Detained Persons) Rules 1960, r. 93(1).

The applicant was being prosecuted for capital offences under the Internal Security Act 1960. The legal practitioner by whom the applicant desired to be defended was being held in preventive detention. The applicant, by notice of motion, applied for the production of his detained counsel of choice, so as to represent him at his trial.

The question of law to be decided by the court is whether an accused person who is being prosecuted upon a capital charge can exercise his constitutional right under Article 5(3) to be defended by a legal practitioner of his choice despite the fact that the latter is being detained under executive detention. The court also had to decide whether it is empowered to order the production of the detained counsel.

Held, dismissing the application: (1) a person is entitled to be represented by counsel of his choice if that counsel is willing and able to represent him. In this case, as the counsel concerned is the subject of a detention order under preventive detention law it cannot be said that he is able to represent the accused even though he may be more than willing to do so;

(2) a condition precedent for the court to invoke its power under rule 93(1) of the Internal Security (Detained Persons) Rules 1960 is that the person must be required by the court. The mere fact that an accused may require the production of the person detained is not conclusive of the matter, though of course it is a relevant consideration;

(3) it has not been alleged that the trial of the applicant in this case will involve difficult questions of law but, even if it does, it cannot be said that the counsel detained, Mr. Kirpal Singh, possesses experience of a nature not available amongst advocates and solicitors in Malaysia. The condition precedent for invoking the power to order production of a detained person, namely, that his presence is required by the court, has not been satisfied and therefore the application must be dismissed.

Cases referred to:

- (1) *Palaniappa Chettiar v. Arunasalam Chettiar* F.M. Civil Appeal No. 34/1958 (quoted in [1961] M.L.J. xxxiii (Practice Note)) (cited).
- (2) *Naresh v. Kanai Lal* A.I.R. 1952 Cal. 852 (cited).

- A (3) *Watney Mann Ltd. v. Langley* [1963] 3 All E.R. 967, 972 (cited).
- (4) *Government of Malaysia v. Lim Kit Siang* [1988] 2 M.L.J. 12 (distd).

CRIMINAL APPLICATION.

- B *Manjit Singh* (S. Asamaley with him) for the applicant/accused.

Bazain bin Idris (Deputy Public Prosecutor) for the Public Prosecutor.

Cur. Adv. Vult.

- C **Edgar Joseph Jr. J.:** The question of law central to this application is whether an accused person in this country who is being prosecuted upon a capital charge can exercise his constitutional right under Article 5(3) to be defended by a legal practitioner of his choice notwithstanding the fact that the latter is being detained under the laws relating to executive detention.
- D

Most particularly, the applicant herein is one Sim Kee Guan, who is being prosecuted on two counts, one for having in his possession, without lawful excuse, in a security area, a firearm and the other for having in his possession, in like circumstances, four live rounds of ammunition, in contravention of section 57(1)(a) and (b) of the Internal Security Act 1960 ("the Act") respectively. Upon conviction, each offences carries a mandatory death sentence. The applicant's trial is scheduled to commence in precisely four days' time.

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- F
- G The application, which was by notice of motion supported by affidavit evidence, was made under the provisions of rule 93(1) of the Internal Security (Detained Persons) Rules 1960 ("the Rules").

- H The legal practitioner by whom the applicant desires to be defended upon the abovementioned charges is Mr. Karpal Singh who, it is accepted, has extensive experience of practice on the criminal side but who is presently being held in detention at Tempat Tahanan Perlindungan, Taiping, by virtue of a detention order issued pursuant to the provisions of the Act.

- I I must now confront the question of law posed in the opening paragraph of this judgment.

The starting point of my examination of the legal position has to be Article 5(3) which provides:

"Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice."

The next provision to be borne in mind is section 255 of the Criminal Procedure Code which, shorn of immaterial parts, provides:

"... every person accused before any criminal court may of right be defended by an advocate."

It is obvious from the constitutional and codified provisions aforesaid that the right to consult and be defended is a right of the person arrested and not a duty of counsel requested. But, more importantly, is that right unqualified? I think not. As was said by the then Chief Justice in the unreported case of *Palaniappa Chettiar v. Arunasalam Chettiar*:⁽¹⁾

"It is wrong to say, as is frequently said, that a litigant is entitled to be represented by the counsel of his choice. The true statement is that he is entitled to be represented by the counsel of his choice if that counsel is willing and able to represent him."

When, therefore, as here, the counsel concerned is the subject of a detention order under preventive detention legislation, it cannot be said that he is able to represent the accused even though he may be more than willing to do so.

I would, therefore, answer the central question of law in the negative.

That, however, does not conclude the matter, for a subsidiary question which arises upon this application is whether, in the circumstances of this case and, quite apart from Article 5(3), the court is empowered to order the production of Mr. Karpal Singh under rule 93(1) of the Rules which provides:

"Whenever the presence of a detained person is *required by any court* of civil or criminal jurisdiction such court may issue an order addressed to the Superintendent requiring production before the court of such person at the time and place to be named in such order, and the said Superintendent shall cause the person named in such order to be brought up as directed, and every such court may by endorsement on such order require the person named therein to be again brought up at any time to which the matter wherein such person is required may be adjourned."

(emphasis supplied)

It is manifestly clear that under rule 93(1) a *condition precedent* for the court to invoke its power to order production of a person detained is

A that "the presence of the detained person must be *required by the court*" and the court alone. In other words, the mere fact that an accused may require the production of the person detained is not conclusive of the matter though, of course, it is a relevant consideration.

B I must next ask myself what the word "required" in rule 93(1) means. It seems to me that the word "required" is something more than the word "desired". Although the element of need is present in both words, the real distinction between "required" and "desired" lies in the insistence of that need. In other words, there is an element of "must" or "necessity" in the case of "required" which is not present in the case of mere "desire": see *Naresh v. Kanai Lal*⁽²⁾ and *Watney Mann Ltd. v. Langley*.⁽³⁾

D Having made these general observations regarding the actual wording of rule 93(1), I must next direct my attention to the issue of critical substance regarding this part of the case: can it be said that the presence of Mr. Karpal Singh is required by this court for the purpose of conducting the defence of Sim Kee Guan?

E In my view, I can only answer this question in the affirmative if I am satisfied that Mr. Karpal Singh's attendance in court for the purpose stated is necessary in order to arrive at a just decision in the case.

G Now, it has not even been alleged that the trial of Sim Kee Guan will involve difficult questions of law but, even if it does, can it be said, that for the purpose of conducting his defence, Mr. Karpal Singh possesses experience of a nature not available amongst advocates and solicitors in Malaysia? With respect, I would say "No".

H It follows, then, that the condition precedent for invoking the power to order production of a detained person under rule 93(1), namely, that his presence must be "required by the court", not having been satisfied, I must answer the subsidiary question posed above in the negative.

I A final point needs to be made. In *Government of Malaysia v. Lim Kit Siang*,⁽⁴⁾ Mr. Karpal Singh, although under detention, did appear as counsel for the respondent but this was *not* pursuant to an order of court under rule 93(1) but by reason of an order made by the Minister of Home Affairs under section 18 of the Act which gives the latter a wide discretion to order the production of a de-

tainee. *Lim Kit Siang's* case⁽⁴⁾ is, therefore, distinguishable.

In all the circumstances, I have no discretion in the matter, and so, this application is dismissed.

Application dismissed.

Solicitors: *Karpal Singh & Co.*

**WAN DAUD BIN WAN JUSOH v. MOHAMED
BIN HAJI ALI & ANOR.**

**DAUD BIN JUSOH v. ANNUAR BIN
HAJI MUSA & ANOR.**

**MOHD. NOR BIN ISMAIL v. MOHD. ZAIN BIN
ABDULLAH & ANOR.**

[O.C.J. (Wan Yahya J.) 30 April 1987]

[Kota Bharu -- Election Petition Nos. 33-2-86, 33-3-86,
33-4-86]

Elections – Election petitions – Amendment of – Whether right to amend excluded by statute – Whether petitions were in conformity with requirements of election laws – Election Offences Act 1954, ss. 32, 34, 36(a), 38(2) & 42 – Election Petition Rules 1954, rr. 4 & 16 – R.H.C. 1980.

The three petitioners were unsuccessful candidates in the general elections held in 1986 and, in their respective petitions, had alleged that their request for recounts were not acceded to by the returning officers. The six respondents, who were the elected candidates and the returning officers in the petitions, took out a motion to strike out the petition on the grounds that the petitions did not conform with the mandatory provisions of the election laws. The first and second petitioners then sought to redress the imperfections in their petitions by motions to amend.

The respondents took objections to these motions to amend. They contended that there was no provision in the election laws for any kind of amendments to be made except those under section 38(2) of the Election Offences Act ("the Act") for withdrawal only, and even if this provision was to be relied on, the time prescribed for amendment to be made had already elapsed, having regard to rule 16 of the Election Petition Rules 1954. It was also contended that the petitions were defective as they were not made in accordance with rule 4 of the Election Petition Rules 1954 ("the Rules") and therefore had not met with the requirements of section 32 of the Act.

Held, dismissing all the three petitions: (1) rule 16 of the Rules does not have the effect of excluding the right of the petitioner to amend in accordance with the Rules of the High Court. Rule 16 merely lays down the stage when the petition is deemed to be at issue. The rule did not stipulate that once the petition is at issue no further remedy is available to the petitioner under the Rules of the High Court. On the contrary, the Rules of the High Court state that the application for amendment could be accorded at any stage of the proceeding subject to certain criteria;

A (2) the criteria for amendment for such cases must, in addition to the express provisions of the election laws, be considered in the light of the principles on amendment as judicially practised in all applications under the rules of court, i.e. it will not embarrass, prejudice or cause any injustice to the other party. The amendment must also not be for the purpose of changing, altering or introducing any new charge or cause of action;

B (3) the court did not consider the amendments to be prejudicial to the case of the respondents and accordingly the petitioners' application to amend the respective petitions were allowed;

C (4) a petitioner who is desirous of challenging the election of a successful candidate must first of all be able to show the court that he has a right to be heard under any or all of the five situations enumerated under section 32 of the Act. The format and essential contents of the petition which he is required to conform with are prescribed under rule 4. Para (b) of sub-rule (1) of that rule enacts in peremptory language that the petition shall state the facts and grounds relied on to sustain the prayer. This requirement is further repeated under para 3 of the specimen form shown in sub-rule (4). A petition under rule 4 therefore must not only narrate the facts complained of but must relate or associate the complaints with the provision of the election laws the respondent is alleged to have transgressed;

E (5) the facts here fall short of the requirements of rule 4. No reason was given as to how the right of the petitioner to a recount has arisen and neither is it stated that the refusal was against any specific provision of the law;

F (6) in respect of the third petition, the petitioner was ostensibly not a person qualified to present a petition under section 34 of the Election Offences Act 1954, as he was not shown in the relevant gazette notification as a candidate who stood for the election;

F (7) the petitions were dismissed pursuant to section 36(a) of the Act and the successful candidates were duly elected to their respective parliamentary constituencies in the last general elections.

Cases referred to:

- G** (1) *Zulkarnaini bin Mohamed Noor v. Syed Omar bin Mohamed & Anor.* [1979] 2 M.L.J. 143 (expld).
(2) *Sabdin Ghani v. Mohamed Saidi Lampoh & 25 Other Election Petitions* [1983] 2 M.L.J. 61 (consd).
(3) *Zulkifle bin Majun v. Dason Gaban* [1983] 1 M.L.J. 396 (refd).
H (4) *Maude v. Lowley* (1873-74) L.R. 9 C.P. 165 (refd).
(5) *Chong Thain Vun v. Watson & Anor.* [1968] 1 M.L.J. 65 (refd).

ELECTION PETITIONS.

I *C. Jegathesan* for the petitioners.

Mohamed Apandi bin Ali for the first respondent.

T. Selventhiranathan for the second respondent.

Cur. Adv. Vult.